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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS TO FILE A BRIEF IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF *AMICUS CURIAE*

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RULE:

Supreme Court Rule 42 iii

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Association of Theatre Owners (hereinafter "NATO") hereby moves for leave to file the annexed brief *amicus curiae*, pursuant to Rule 42 of the Supreme Court of the United States, in support of the Jurisdictional Statement filed by Appellant herein. The attorneys for the Appellant have consented to the filing of this brief; the attorneys for the Appellee have not responded to our request for such consent.

NATO is a trade association which represents the interests of motion picture theatres throughout the United States. It has a membership of over 8,000 theatres (repre-

senting a capital investment of over $5 billion) located in cities, suburbs, small towns and rural areas across the country. Its members include large "downtown" theatres, neighborhood theatres, shopping center theatres, drive-in theatres and multi-screen theatres, and the motion pictures they show represent an immensely important medium of artistic, cultural, political and social expression, as well as entertainment, for untold millions of American movie-goers.

NATO and its members are vitally interested in this appeal, which, unfortunately, involves a not atypical example of how this Court's rulings in *Miller* v. *California*, — U.S. —, 41 U.S.L.W. 4925 (June 21, 1973) and *Paris Adult Theatre I* v. *Slaton*, — *U.S.* —, 41 U.S.L.W 4935 (June 21, 1973), are being misapplied to strike at the very heart of the First Amendment rights of theatre owners to show films of serious artistic worth, regardless of how controversial they may be.

The Appellant-theatre owner in this case was convicted under a state criminal statute, not for displaying "hard core" pornography, but for showing one of the most critically acclaimed motion pictures of recent years, which had previously played "in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic".[1] Clearly, if a motion picture such as "Carnal Knowledge" is deemed "obscene" and therefore beyond the pale of constitutional protection, then all of NATO's members, as well as all other theatre owners in the United States, face a real threat of criminal prosecution whenever they show any film that could conceivably be found objectionable by some local prosecutor and jury. Indeed, the gravity of this danger grows each day as the pattern of local prosecution and harassment

[1] Dissenting opinion of Justice Gunter in the Georgia Supreme Court, at p. 8 of the Appendix to Appellant's Jurisdictional Statement (hereinafter "Appendix, p. .")

that has followed *Miller* becomes increasingly pronounced. Thus, the decision of the Georgia Supreme Court in this case serves to chill—if not freeze—the exercise of First Amendment rights of expression so far as this nation's theatre owners are concerned. The result, in our submission, can only be to lower the quality and diversity of the motion pictures shown across the country and seriously impair one of our most popular and available forums for the free interchange of ideas.

In view of the foregoing, NATO seeks the Court's permission to file the annexed brief and urges the Court to give plenary consideration to the appeal, to reverse the decision of the Georgia Supreme Court, and to take this opportunity to elucidate the *Miller* standards to make clear that pictures such as "Carnal Knowledge" which are not "hard core" pornography are protected by the First Amendment.

Respectfully submitted,

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BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

As set forth in the foregoing motion, the National Association of Theatre Owners (hereinafter "NATO") is a trade association representing theatre owners throughout the United States. Its members are being prosecuted and harassed for showing motion pictures which we believe are clearly protected by the First Amendment and cannot by any stretch of the imagination be considered "hard core" pornography. If the decision on appeal from the Supreme Court of Georgia is not reversed, there will inevitably be a substantial increase in this prosecution and harassment, with a consequent restraining effect on First Amendment rights of speech and expression.

Preliminary Statement

Appellant has raised in his Jurisdictional Statement a number of issues concerning the interpretation of the relevant Georgia statutes and the particular procedures followed in the trial court. While NATO agrees that Appellant's position on these points is correct and that the errors referred to warrant reversal of the Georgia Supreme Court's decision, it does not believe that a reversal based on such narrow grounds will be of general significance nor suffice to alleviate the chilling effect on First Amendment rights that is rapidly developing in the movie industry today. NATO therefore urges the Court to limit plenary consideration of this appeal to the following issues which are of national concern and vital constitutional significance:

1. Whether the First Amendment as interpreted by *Miller* v. *California*, — U.S. —, 41 U.S.L.W. 4925 (June 21, 1973) protects from prosecution all motion pictures and other forms of speech and expression except material which is patently and obviously "hard core" pornography, and whether the film "Carnal Knowledge" is such "hard core" pornography so that it is outside the First Amendment's protection? (Point I)

2. Whether this Court in *Miller* meant to authorize the literally hundreds of thousands of local cities, towns, counties and villages throughout this country to apply their individual standards in adjudicating whether a motion picture appeals to the prurient interest, is patently offensive or lacks serious value? (Point II)

These two issues are squarely before the Court on this appeal. The Georgia Supreme Court specifically held, over the vigorous dissent of three of its seven justices, (i) that the film "Carnal Knowledge" is obscene and not protected by the First Amendment, and (ii) that the trial court was correct in instructing the jury to apply a local rather than a state-wide standard for determining the issue of obscenity.

POINT I

A motion picture such as "Carnal Knowledge," which is not patent and obvious "hard core" pornography, is protected by the First Amendment.

The Chief Justice's opinion for the Court in *Miller* states:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe *patently offensive 'hard core'* sexual conduct specifically defined by the regulating state law, as written or construed." 41 U.S.L.W. at 4928 (emphasis added).

Indeed, the *Miller* opinion specifically purports to set forth "concrete guidelines to isolate *'hard core'* pornography from expression protected by the First Amendment." 41 U.S.L.W. at 4929 (emphasis added). Additional references to "hard core" pornography appear throughout the decision.[1] Furthermore, the Court in *Miller* expressly adhered to the basic principles of *Roth* v. *United States*, 354 U.S. 476 (1957), that "ideas having even the slightest redeeming social importance" have the full protection of the First Amendment, and that obscenity is not protected by the First Amendment precisely because it is "no essential part of any exposition of ideas." 354 U.S. at 484-485, quoted in *Miller*, 41 U.S.L.W. at 4926. In short, while the Court sought to establish a constitutional standard under which patent and obvious "hard core" pornography could be outlawed by the states, it plainly did not intend to limit the scope of First Amendment protection for motion pictures that do not fall within this category.

It is thus plain that this Court never intended *Miller* to be used as a springboard for prosecuting a film such as

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[1] *See, e.g.*, 41 U.S.L.W. at 4928, 4929, 4931.

"Carnal Knowledge" that is obviously not "hard core" pornography—that, on the contrary, has been the subject not only of wide-spread critical acclaim, but also of critical commentary and debate with respect to the ideas, characters and view of the human predicament that it presents.

The difficult problem, of course, as this Court has long recognized, is to articulate on paper a standard which makes this basic division between protected and unprotected speech reasonably clear to prosecutors, judges and individuals conscientiously trying to obey the law. Unfortunately, the Georgia Supreme Court's decision below and the recent actions of prosecutors in other parts of the country in harassing pictures such as "Last Tango in Paris"[2] make it apparent that *Miller* was not successful in clarifying this all-important line.

We therefore urge that the Court in adjudicating this appeal should specifically hold as a matter of constitutional fact that the film "Carnal Knowledge" is not obscene because it is not patent and obvious "hard core" pornography.[3] Furthermore, the Court should make clear that

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[2] *See, e.g., United Artists Corporation* v. *Harris,* Civil No. CIV-73-498-D (W.D. Okla., filed July 24, 1973) and *United Artists Corporation* v. *Proskin,* Civ. No. 73-CIV-315 (N.D.N.Y., filed July 16, 1973) in which threats of prosecution resulted in termination of exhibition of "Last Tango in Paris." *See also Incorporated Village of Lynbrook* v. *United Artists Corp.* (New York Supreme Court, Nassau County, Special Term, Part I, Index No. 11383/73), in which further exhibition of "Last Tango in Paris" is sought to be enjoined.

[3] It is, of course, squarely within this Court's province to determine for itself whether "Carnal Knowledge" is in fact obscene under the relevant constitutional standards since "the duty rests on this Court to decide for itself facts or constructions upon which Federal Constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 121 (1954). *See also Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

only such "hard core" pornography—smut for smut's sake, if you will—forfeits First Amendment protection. We respectfully suggest that such an explicit statement by this Court, that films that are not patent and obvious "hard core" pornography cannot be prosecuted, would go a long way toward clarifying the rather nebulous standard enunciated in *Miller* and removing a significant cloud that presently serves to inhibit freedom of expression in the motion picture industry.

POINT II

Under *Miller* v. *California*, state-wide "community" standards should be applied to determine prurience and patent offensiveness, and a national standard should be used to determine serious value.

In *Miller*, the California courts had used the "contemporary standards of the State of California" to adjudicate the prurience and patent offensiveness of the material in question, and this Court thus specifically upheld the use of a state-wide standard with respect to these criteria. Nevertheless, there has been much confusion following *Miller* as to whether state courts and legislatures must apply state standards or can instead allow the myriad communities within a state to apply their own local standards.[4] In the instant case, the Supreme Court of Georgia applied its own "local" community standard test,[5] with

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[4] *Compare e.g.*, *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049, 1065 (Wash. 1973) (state-wide standard required) *with Rhodes* v. *State*, — So. 2d — (S. Ct. of Fla., Case No. 41,416, September 19, 1973) (local standards applied).

[5] The trial judge instructed the jury to apply a "community standard" (R. 5, 66) and the Georgia Supreme Court clearly understood this to refer to the local community in Dougherty County, Georgia rather than the state as a whole. Thus Justice Jordan's majority opinion interpreted *Miller* as authorizing *"state or local*

the anomalous result that "Carnal Knowledge" has been found obscene by the local standard of Dougherty County, although it has been shown—with apparent constitutional protection—in many other Georgia towns and cities.[6]

It takes no great prescience to realize that such balkanized application of the United States Constitution must inevitably destroy any pretense of a fair and uniform system of criminal justice. Furthermore, from the standpoint of NATO and its members, it makes it totally impossible for a theatre owner to have any way of knowing whether the exhibition of a particular motion picture constitutes a protected expression of his First Amendment rights or the commission of a crime. Indeed, he does not even have any advance knowledge as to whether the relevant community standard will be that of a county, a city, town or village, or even a section or neighborhood within one of these units. The 14,000 motion picture theatres in the United States are located within many thousands of different political subdivisions. An impossible crazy-quilt will result if each of these units is to apply its own standards so that films are outlawed in some places and constitutionally protected in adjoining places within the same state. Thus with respect to prurience and patent offensiveness, we respectfully urge the Court to make clear on this appeal that only state-wide standards can be applied under *Miller*.

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community standards in lieu of 'national standards'" (Appendix, p. 3) (emphasis added). This shows that the Georgia Court considered a "local" standard to encompass a smaller area than a "state" standard. Furthermore, Justice Gunter's dissent states that the majority was referring to "this 'local community'" as meaning Dougherty County (Appendix p. 5), and Justice Hawes' dissent specifically points out that the majority approved "small towns and hamlets as being the 'community' from which the standard for obscenity is drawn . . ." (Appendix, p. 16).

[6] *See* Justice Gunter's dissent, Appendix, p. 8.

The Georgia Supreme Court further applied local community standards in passing upon the issue of whether "Carnal Knowledge" possesses serious value as a motion picture. *See* Appendix, p. 3. Here, the Dougherty County jury utilized the stricter pre-*Miller* test provided by the Georgia statute and found that this Academy Award winning film—one of the "10 Best" pictures of 1971— was not merely lacking in serious artistic value "taken as a whole",[7] but indeed was "utterly without redeeming social value". Appendix, p. 3.

In *Miller*, this Court sanctioned the use of community (i.e., state-wide) standards only with respect to the issues of whether allegedly obscene material appeals to the "prurient interest" or is "patently offensive". 41 U.S.L.W. at 4929. It plainly did not suggest that anything less than a national standard may be used to judge serious value. A tolerance for offensiveness may indeed vary from Maine to New York or from Mississippi to Nevada; but a book such as *Ulysses* does not cease to be a treasured classic of our civilization simply because it is carried across a state line, and a film such as "Carnal Knowledge" is not emptied of its nationally-recognized artistic merit by virtue of being shown in Dougherty County, Georgia.

The verdict of the Dougherty County jury plainly shows that the effect of applying *any* parochial standard of artistic worth is to vitiate totally the constitutional safeguard articulated in *Miller* that no work may be stripped of its First Amendment protection unless, "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value". 41 U.S.L.W. at 4928. Again, unless this aspect of *Miller* is clarified, we will continue to see a distressing growth of local "obscenity" suits aimed incongruously at the best products of the American motion picture industry.

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[7] See *Miller* v. *California*, 41 U.S.L.W. 4925, 4928 (June 21, 1973).

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted and the decision of the Georgia Supreme Court reversed on the grounds set forth above.

Respectfully submitted,

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